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The Oral History Program

An Interview With Former General Counsel John S. Warner (U)

Editor's Note: The celebration in 1997 of the 50th Anniversary of the CIA served as a reminder of the Agency's fascinating history, with all its successes and its failures. Fortunately, it is still possible to speak with and learn from individuals who were present during the Agency's earliest years. One of those individuals, John Warner, provided to multiple interviewers his recollection of his time with CIA. Although Mr. Warner retired in 1976, he continues to write and speak about the issues concerning intelligence and national security law. He noted that his remarks are snapshots from the past and are illustrative of matters that arose in the history of CIA. One should not draw broad conclusions before exploring the full details of the incidents mentioned.

Photo: John Warner

John Warner served as the Agency's General Counsel from 1973 to 1976. He was present at the creation of CIA, serving as Deputy General Counsel in the Central Intelligence Group in 1946 and remaining in that post with CIA until his appointment as General Counsel in 1973. From 1957 to 1968, Mr. Warner served as Legislative Counsel while maintaining, for most of those years, his post as Deputy General Counsel.

Through the course of his career, John Warner witnessed--and frequently played an important role in--many of the major events and decisions that have shaped the Agency. From designing the legal framework for the Agency, through the evolution of the Agency's relationship with Congress, to Watergate and the damaging revelations of the 1970s, John Warner was on the scene.

Mr. Warner was born in Washington, DC. He began working in a bank when he was 16, and he worked his way through college and law school. He was finishing his master's degree when the Japanese attacked Pearl Harbor. The day after completing his degree, Mr. Warner enlisted as an aviation cadet, was trained to fly B-17s, and eventually completed 35 combat missions in Europe. While home on leave, Mr. Warner met James Donovan, General Counsel of the OSS, at a Washington cocktail party. The two hit it off, and Donovan arranged to have Warner transferred to the General Counsel's office of OSS in December 1944.

The following excerpts, preceded by brief introductions to the excerpted topics, were obtained from two interviews with Mr. Warner that were done under the auspices of the oral history program of the Center for the Study of Intelligence.

***On the origins of CIA.** John Warner quickly befriended Larry Houston, another OSS lawyer, who went on to become CIA's first General Counsel. After the war, the two moved with the clandestine collection and support components of OSS, renamed the Strategic Services Unit, to the War Department until the Central Intelligence Group (CIG), was created in January 1946. Houston and Warner together drafted the legislative proposals to establish the CIA. These were to be a part of the National Security Act of 1947, but the Truman administration preferred to keep the CIA component of that Act more general. Their work was eventually encompassed in the CIA Act of 1949.*

John Warner (JW): [Thomas] Troy's *Donovan and the CIA* states [DCI Hoyt] Vandenberg commissioned preparation of a bill to create the CIA and sent it to Clark Clifford [then Special Counsel to President Truman]. Houston's recollection of this event is somewhat different. He recalls that he and I had written a substantial part, if not all, of the legislation prior to Vandenberg's arrival on the scene.

While working on other problems, I discovered a Federal statute, the Independent Offices Appropriations Act of 1945, which provided that a government entity set up by Presidential directive could not exist for more than one year without legislation. Technically, CIG was an entity without legal standing.... That's why we sat down and wrote as quickly as possible. In fact, I wrote the first drafts.

I was a young lawyer, never practiced, never been in government, and so what do you do? I went to the Executive Order, which established the CIG, to pick up what CIA was to be, and then I went to the OSS Appropriation Acts, because that was the only statutory thing about OSS. It was probably the smartest thing I ever did, because that was the guts of what later became the CIA Act of 1949.

On unvouchered funds. *One of the key provisions of the CIA Act of 1949 permitted the Director to expend funds "for objects of a confidential, extraordinary, or emergency nature" on his own authority without having those expenditures subject to audit by the GAO. These funds are known as "unvouchered" or "special" funds. Mr. Warner explains below that the Congress accepted CIA's need for unvouchered funds because the GAO had worked with OSS and understood that the Agency's mission required them.*

JW: The authority for unvouchered funds... that's the guts of the ability of CIA to do its work... to run espionage operations and covert action requiring the highest security. Every other agency in government, whatever vouchers they create are reviewed by the GAO, and they can take exception to it and so forth...

George Washington was the first one to get unvouchered funds. In fact, in the first Congress he said there ought to be a statute authorizing this, and there was. And it's been repeated over the years, except that CIA was the first Agency that got it up to 100 percent of its funds.

Because... the way things started, GAO was on the premises in OSS, and we learned to work with them. And [OSS General Counsel] Jim Donovan even submitted requests to them for an opinion. It was advisory only because it involved unvouchered funds. And there were other questions we would talk to GAO about. So when they were asked [by the Congress] for comments, they said, "Well, we would generally be against this kind of thing, but in view of the mission of CIA, we think it's necessary." Now that's a big step to get the Comptroller General to agree that at least half our money would not be looked at by him. It's also interesting [that] about the same time the Atomic Energy Commission, which was a separate agency, was asking for a big chunk of unvouchered money, and Congress said, "No" and the Comptroller General said, "No."

As you may or may not know, there were a couple of Communists who were members of the Congress, in the House, and they objected all over the place. They objected to the unvouchered funds, and they objected even to the concept [of the CIA].

On the DCI's authority to bring foreign nationals into the country. *One of the more controversial clauses of the CIA Act of 1949 gave the DCI permission to bring up to 100 foreign nationals into the United States each fiscal year, regardless of whether they qualified under the immigration laws.*

JW: Essentially, what happened is, [Senator] McCarran, who was head of Senate Judiciary, which has jurisdiction over immigration matters, said this is an impingement on the immigration authorities. [I explained] to him that this was not an immigration matter, that this was an operational matter to bring a very important alien into the country without regard to all the special provisions of the immigration laws and that probably, very rarely would we get to 100. As it turned out... for many years [there were only] seven or eight a year. But we had to report to McCarran. We said, "We'll give you a yearly report," and he said okay. That was the controversy. It wasn't on the substance of the thing, it was jurisdiction.

On the Office of General Counsel.

JW: I don't know how long it took us to get 10 lawyers [in OGC], but maybe five or six years. And there were no cases that brought us into court as a party, [although] we were increasingly involved with courts in one way or another. [In] private suits where someone was undercover . . . we would try to work arrangements with the judge or with opposing counsel. We'd clear the opposing counsel and brief him: "Look, it has nothing to do with your suite but would you respect this [operational equity]?" And they did. Running through all this, touching base with the judge or opposing counsel was the theme. Never put a false document into court. Never. If you had to take chances on the security involved, you'd do that, but you'd never put a false document, or direct an employee to put a false document. . . . We were lawyers, you just don't lie to a judge . . . [S]omething that ran through most of our work was the question of preservation of security and compliance with the law. And, of course, the United States with all its laws is the most difficult country in the world. We have so many laws.

On agent contracts. Below, Mr. Warner discusses the case of an agent who sued the Agency for breach of contract. In the *Totten* case that Mr. Warner refers to, the estate of a Union spy sued the government, claiming that it breached a contract that had existed between the spy and President Lincoln. The Supreme Court ruled against the spy's estate, arguing that, "The secrecy which such contracts impose preclude any action for their enforcement."

JW: There's a long history on that, it's a Civil War case, *Totten*. Where a Union spy sued for back pay. And it went to [the] Supreme Court, and the Supreme Court said there is no basis for any such action. In the one case that came up, we cited the *Totten* case. There had been no citing of it for many, many years. Now there's a lot of them.

On the Marchetti case. *Victor Marchetti served with CIA from 1955 to 1969. Most of that time he was a Soviet military analyst, but, for the last three years of his career, he worked as a staffer in the DCI's office, including a stint as executive assistant to DDCI Rufus Taylor. It was from that vantage point that he learned much about the Agency's covert actions, which he sought to expose in a book after he left the Agency. Upon learning of Marchetti's plans to publish, the Agency on 18 April 1972 successfully sought an order in a US District Court forbidding him to disclose any information about CIA and requiring him to submit his manuscript for review before publishing it. John Warner wrote an article on this episode, and the article, "The Marchetti Case: New Case Law," was published in Studies in Intelligence in the spring of 1977.*

JW: A publisher came to us and said, "Here is a manuscript I think you ought to look at because it looks like it has some sensitive things in it." Prior to this, we'd often thought about what you do when someone threatens to publish or put out classified information. We thought that you would want to get an injunction to prevent him from publishing. Now to get a temporary injunction you've got to have a pretty compelling case....

Well, we had studied this in a theoretical way and looked at commercial contracts to protect proprietary information and thought we could go on a contract theory [arguing that a mutual agreement to protect classified information should be enforced] because everyone signed a secrecy agreement.... Colby called, he was Executive Director then, and [he asked] whether we ever thought about going to court [to prevent disclosure]. I said, "We sure have." . . .

[DCI Richard] Helms was concerned about being in court... But Larry [Houston] and I went to see him and explained it. He went to talk to Nixon about it...and Nixon said, "Well, if it's that bad, or important, have your lawyers talk to my lawyers." So Larry and I went to see John Ehrlichman, and by then we had a pretty good reading from various directorates on how sensitive some of the material [Marchetti intended for publication] was.... Obviously, when we go to court [the Department of] Justice is our lawyer. And so we talked to Irwin Goldblum [a lawyer from the Department of Justice], and we prepared the necessary papers....

So what we have here is the first time that the CIA as a plaintiff went in to guarantee and protect its

rights and we won. [E]very time you go in court you are losing something. But for me this Marchetti case is precedent shattering. We go in as a plaintiff to protect ourselves....

On the Snepp case. After the Marchetti case, it was clear that CIA had the right, by virtue of the contractual provisions of the secrecy agreement, to review works that current and former Agency employees planned to submit for publication. The Agency knew that Frank Snepp, who had worked for the Agency from 1968 to 1976, intended to publish a book, and that he and his lawyer assured then DCI Stansfield Turner that he would submit his manuscript for review prior to publishing. He reneged on that promise, however. In the ensuing legal battle, the Agency successfully prevented Snepp from receiving his royalties from the publication of *Decent Interval*.

JW: [In the Snepp case that followed Marchetti] for purposes of the trial, CIA's position was, "We are not alleging that there is any classified information in this book. We are just saying he violated his contract." He didn't submit [to the Agency the information he intended to publish], although he had signed a secrecy agreement.... The Supreme Court ruled [in favor of enforcing the secrecy and prepublication review agreements] and approved the forfeiture by Snepp of all profits from his book. So Marchetti and Snepp. I just felt these are tremendous victories the little old lawyers won.

The Freedom of Information Act. The Freedom of Information Act, which Mr. Warner discusses, entitles anyone to request and receive copies of records in the possession of the executive branch of the Federal Government unless those records fall within certain exempted categories.

JW: [W]e get to FOIA [Freedom of Information Act] [and] the FOIA amendments. These...impacted every government agency, but particularly the security agencies. The day after it became effective, Morton Halperin put in at least five letters [requesting information from] us, and seven or eight to others... and he was practically a member of Senator Kennedy's staff in getting the amendments passed....

Now [before the FOIA amendments became law,] we sa[id] this should be vetoed, it's unconstitutional.... It provides, if the Agency doesn't answer in 30 days, that they can file suit. You know, ridiculous. Then, of course, courts don't pay any attention to that, but it's wrong to put on the statute books something that no one is going to pay any attention to... so we recommended that the President veto it, and he did. And it was overridden.

On Congressional oversight: Before the formation of the House and Senate Select Committees on Intelligence, formal Congressional oversight of CIA was performed by small subcommittees of the Appropriations and Armed Services Committees. These committees were among the busiest in the Congress, and their members occasionally did not have time to hold hearings on CIA, even on important matters like its budget. The substantive committees, such as the Senate Foreign Relations Committee, often asked for briefings on world events, but Warner notes that Agency officials would brief on operational matters only to the CIA subcommittees of Appropriations and Armed Services.

JW: In the first few years I was there, I would...go to each of the committees [and say] "Please, will you hold a hearing so we can brief you." To our own subcommittees, [we briefed on covert action] and other operational matters. But...how well they were briefed is another matter because, if you only met with them once, and there was some event occurring worldwide, that [significant event] got the attention. We did not give them anything in writing. I don't think they had safes.

House Foreign Affairs, Senate Foreign Relations...they would call us... now and then for sensitive intelligence briefings.... We felt we were just as responsible to the Congress as we were to the President. The Congress created us, plus Congress gave us our money. In other words, we were realists. We drew the line when it came to operations.... It was never intrusive. They would ask for an explanation. They might halfheartedly "tsk, tsk," if you missed something...but they never jumped on us. Never.

[We were asked to give] a budget briefing, Sunday afternoon, in the House Office Building in the Capitol at 1 p.m. Okay, I said fine.... Sure enough, there we all are 1 p.m., Longworth Building.... It was sort of a crowded room and Clarence Cannon greets Dulles, "Oh, it's good to see you again Mr.

Secretary." He refers to [Secretary of State John Foster Dulles rather than DCI Allen Dulles] but he knows it is the CIA budget. [Allen] Dulles is a great raconteur. He can tell story after story. He reminds Cannon of this, and Cannon reminds him of that, and they swap stories for two hours. And, in the end: "Well, Mr. Secretary, have you got enough money in your budget for this year, the coming year?" "Well, I think we are all right, Mr. Chairman. Thank you very much." That was the budget hearing. Now [some members, including then representative Gerald Ford] were visibly disturbed by this.... So I pulled [them] aside and I said, "Gentlemen, would you like me to arrange a briefing either here or at the Agency on our budget?" And they... thanked me. And we did [have another briefing] without, obviously, telling the Chairman. And that's why I got to be such good friends with Gerry Ford.

When we began getting into a lot of matters before the Church and Pike Committees... there was a strong core of resistance in the Directorate of Operations. They didn't see why it had to be done. There is still that group that thought Colby did too much [in the way of providing information]. And they were wrong.

On the Church Committee: *On 22 December 1974, The New York Times published an article by Seymour Hersh that alleged CIA had seriously violated its regulations by conducting widespread, illegal operations against domestic dissident groups, such as the anti-Vietnam war movement. Other stories of a similar vein followed, and, in early 1975, the Senate voted to create the Senate Select Committee To Study Governmental Operations With Respect to Intelligence Activities under the chairmanship of Senator Frank Church. The House followed suit by establishing a similar committee under the chairmanship of Representative Otis Pike.*

JW: Church came out with that "CIA is a rogue elephant" statement before he ever had a hearing.... He was running for President.... So they got their charter and I remember vividly Colby and [I] went down to visit Church and his committee counsel.... The purpose of our going down was to establish agreed-on procedures for dealing with classified information, both in terms of personnel and in terms of documents. Church listened politely. Colby said, "We want your people to have standard kinds of safes, we will send security people down to brief your staff people on what kind of safe, or we will provide the safes. We will help you with your procedures for handling documents. We will ask your staff people to undergo investigation and sign secrecy agreements. Now, Senator Church, your clearance consists of the vote of your state that elected you." Patting him on the back.... Colby said, "I see no problem with that," despite the fact that Church had called the CIA a rogue elephant before the hearings ever opened.

The Church Committee issued a report and issued a later legislative proposal.... Very critical, but their report says, which Church signed as Chairman, "CIA has been responsive to the Presidency throughout." No rogue elephant. No one ever saw that in a headline. A lot of their recommendations, and proposed legislation, were ridiculous. This is again the staff. Senators don't read these reports in detail....

On MKULTRA: *MKULTRA was the principal CIA program for the research and development of chemical agents designed to control human behavior. Begun in 1953 out of fear that the Communist countries had made significant progress in mind control, the program lasted for 10 years and eventually focused on using LSD to obtain information from individuals and to control their behavior. On 27 November 1953, Dr. Frank Olson, a civilian employee of the Army, fell to his death from a New York City hotel window eight days after having been administered a dose of LSD by a CIA officer as part of an experiment. The program continued after Olson's death and included the administration of LSD to individuals.*

JW: [In many cases of high-profile flaps,] OGC didn't have the full, unadulterated story.... Because the operators, in part, partook of Helms's view of things. Don't get the lawyers in it. That's part of the operational kind of thinking.... About the Olson case.... The fellow that jumped out the window [allegedly because he was unwittingly administered hallucinogens by the Agency]...we didn't know it was part of a program that did this and did that, but it was quite clear that we had the essence of it that he had agreed that he would be a subject. And no one can say for sure whether this led him to jump out the window, but it was not unreasonable to suppose that it did.... [A]gain, we weren't told the entire story of the program. We were told strictly the elements around this one case. It never occurred to us to raise a question about the propriety of the program.

I've often thought, without making a decision, that we should have been more proactive.... We never went looking for things that would raise questions. When things came to our notice we would act on it[, but we] never went looking for things, which is really an IG function.

On Watergate: *The five burglars who broke into the headquarters of the Democratic National Committee on 17 June 1972 all had CIA connections. Their leader, James McCord, had worked in the Office of Security, and the others, all Cubans, had worked with CIA on the Bay of Pigs operation. A longtime former Agency employee, Howard Hunt, then working for the White House, was also implicated in the burglary. It later emerged that Hunt had used CIA equipment in breaking into the office of Daniel Ellsberg's psychiatrist. Ellsberg had been the source of The Pentagon Papers leak.*

JW: The first time I got involved in Watergate, the US Attorney for the District of Columbia [Earl Silbert] asked if I would come by.... And so I went down there, by myself, and he was there with one other person...and started asking me these various questions.... Up to that time I had, in no way, been involved in anything relating to Watergate, nor did I know the Agency was in any way involved. So the question came as somewhat of a surprise.... Develop some film for Hunt? So I had these two pages of questions, I just can't remember all of them, but they were all, a number of them were things that had more or less appeared in the newspapers, so I knew what in the hell was cooking. I wrote this memorandum and sent it to the Director [Helms].... [Helms] addressed [a] meeting and expressed concern: "What are we going to do about this?" Not one person spoke out until I did. I said, "Dick [Helms], no matter what, we've got to respond to this. A US Attorney for the District of Columbia need answers. I haven't the slightest idea what this is about. None of these questions mean anything to me." [Helms] expressed his concern about involving CIA in the Watergate problem. I said, "Dick, we've got to respond. Now, if you've got some problems that I don't know about you may want to talk to the Attorney General, I don't know, but until I know more about it I can't give you any suggestions."... Eventually, the data was given to me in writing, and I put it together in some sort of package and took it back to the US Attorney.

On the need for secrecy.

JW: We overdid it some ways.... I think in some of our dealings with other [US Government] agencies we overdid the secrecy bit. We should have been more forthcoming.... There are a lot of reasons to be suspicious of CIA, or any government agency. I hear on television programs about this introduction of drugs in Los Angeles. But, on the other hand, what happened with DCI Gates, and others, is that they've opened up a lot of the Agency that they had to do, and should have been done earlier. Before, you go back to the 1950s, and everything is secret...the fact that we exist is almost secret.

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